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No. 85-1778

In the Supreme Court of the United States

October Term, 1985

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL 626,
Petitioner,

vs.

THE KROGER COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

ROLF H. SCHEIDEL, *Counsel of Record*
TIMOTHY C. McCARTHY
SHUMAKER, LOOP & KENDRICK
North Courthouse Square
1000 Jackson
Toledo, Ohio 43624-1573
(419) 241-9000
Counsel for Respondent,
The Kroger Company

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Sixth Circuit properly determined that the district court did not abuse its discretion in denying a Union's request for a preliminary injunction pending arbitration of a grievance where the Union failed to establish the existence of equitable grounds supporting issuance of the requested relief.

STATEMENT REQUIRED BY RULE 28.1

The Kroger Co. has no parent company. In addition to wholly-owned subsidiaries, The Kroger Co. has ownership interests in Nutrisearch, International Corp., Henpil, Inc., Wydiv, Inc., and Sugarcreek Packing Co.

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Respondent, The Kroger Company, respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, published at 778 F.2d 1171 (6th Cir. 1985).

STATEMENT OF THE CASE

The petition arises from the Sixth Circuit's affirmance of the district court's denial of a request for a preliminary injunction preventing respondent, The Kroger Company ("Kroger"), from disposing of its interest in three closed stores pending arbitration of a grievance filed by petitioner, United Food and Commercial Workers Union, Local 626 ("Union"). The district court, after an evidentiary

hearing, held that the Union had failed to demonstrate the existence of equitable grounds supporting issuance of the requested relief. The Sixth Circuit, finding no abuse of discretion, affirmed.

The Sixth Circuit's summary of the facts is both succinct and accurate. Kroger operates approximately 1,090 retail grocery stores in eighteen states. Before September 23, 1984, Kroger operated three stores in Lima, Ohio. The Union represents 23 former employees of the meat and seafood departments of the three Lima stores. A2.

Due to mounting losses, Kroger closed the three stores and discontinued its Lima operations on September 22, 1984. A2. Afterwards, the Union filed a grievance, claiming that Kroger was in breach of the "successors and assigns" language[1] of the preamble to the collective bargaining agreement unless it imposed an obligation upon potential transferees of store assets to: (1) recognize the Union, (2) adopt the agreement, and (3) employ members of the Union covered by the agreement. A3. When Kroger refused to do so, if and when it found buyers, the Union filed suit in the United States District Court for the Northern District of Ohio on October 2, 1984, seeking an order requiring Kroger to arbitrate the grievance and restraining it from transferring the assets of the three stores[2] pending resolution of the grievance by an arbitrator. A5.

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1. The preamble to the Agreement reads as follows:

THIS AGREEMENT entered into by and between The Kroger Co., Columbus, Ohio and Solon, Ohio, hereinafter designated as the Employer, its successors and assigns, and Local 626 of the United Food and Commercial Workers Union, chartered by the United Food and Commercial Workers International Union, AFL-CIO/CLC.

2. Kroger owned one of the buildings and leased the other two.

After an evidentiary hearing on the Union's motion for a preliminary injunction, the district court ordered Kroger to arbitrate the Union's grievance and entered detailed findings of fact and conclusions of law with respect to the Union's request for a status quo injunction preventing sale of the stores' assets. A24. The court found, *inter alia*: that Kroger had operated the stores at a loss for two years; that Kroger's capital investment in the three stores exceeded $3,000,000; that there remained in the stores $466,000 in inventory, $278,000 in leasehold equipment, and over $1,000,000 in equipment and rolling stock; and that "a delay in the sale of the stores will have a substantial adverse impact upon the saleability and purchase price of the stores." A16-A19. In regard to delay of the sale, the evidence at the hearing demonstrated that one to two months' postponement would cause a loss of $500,000 in inventory and a thirty to fifty percent decrease in the value of the assets. A6.

Weighing the equities, the district court concluded that an injunctive order would cause more economic harm to Kroger than any harm the Union might suffer from the order's denial and that, in any event, the Union had an adequate remedy at law through the grievance and arbitration process. The court also considered the Union's likelihood of success in arbitration, concluding that "the equities balance in favor of defendant." A22-A24.

Upon review, the Sixth Circuit found no abuse of discretion by the district court and affirmed the judgment below. 778 F.2d at 1176-77. The Union now seeks a Writ of Certiorari from this Court to review the Sixth Circuit's decision.

REASONS FOR DENYING THE PETITION

1. THERE IS NO CONFLICT AMONG THE CIRCUITS REQUIRING REVIEW BY THIS COURT

The Union seeks review of the decision below on the basis of asserted conflicts with decisions of other circuits. Upon examination of the cases, however, the alleged conflicts quickly disappear.

I.A.M. Lodge No. 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981), does not present "identical facts," as alleged by the Union. Nor is the Seventh Circuit's decision at odds with the decision below. *Panoramic* involved the sale of a profitable division to a group of investors composed of the defendant-employer's officers and supervisors who intended to continue operating the division without honoring an existing collective bargaining agreement. In assessing a prerequisite to injunctive relief —balance of hardships—the Seventh Circuit pointed out that the proposed sale was not motivated "by any financial imperative" and thus found no merit in the employer's argument that continued operation pending arbitration was a hardship tipping the scales against issuance of an injunction.[3] *Id.* at 289. In this regard, the Seventh Circuit cautioned:

> We are not unaware, however, that routine issuance of injunctions against the sale of businesses could in many cases be extremely disruptive and costly. Hence we emphasize the need for searching

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3. Ironically, the employer ultimately prevailed in arbitration, but as a result of the delay caused by the preliminary injunction, the sale fell through. Miller, *Mergers and Acquisitions: Labor Relations Considerations*, 9 EMP. REL. L.J. 427, 440 (1983-84).

analysis of the facts and law peculiarly applicable to each case when confronted by a request for the sort of injunction sought here. *Id.* at 289.

The "searching analysis" prescribed by the Seventh Circuit was in fact conducted by the district court in the present case. That analysis disclosed that the three closed stores, which had previously operated at a loss, would remain idle for months and, possibly years, providing employment to no one, if an injunctive order issued. In contrast to the circumstances in *Panoramic*, the district court in this case concluded that "a delay in the sale of the stores will have a substantial impact upon the saleability and purchase price of the stores." Thus, in keeping with the Seventh Circuit's caution in *Panoramic*, the district court correctly concluded that under the facts of this case the balance of hardships weighed against the issuance of injunctive relief.

The other circuit decisions cited by the Union are also not in conflict with the decision below. The Third Circuit's decision in *Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094 (3d Cir. 1985), did not involve a request for an order enjoining a sale or transfer of assets. Rather, the lower court enjoined an employer who had already sold its business from distributing the sale proceeds pending arbitration. This decision obviously has no bearing on the present case, where Kroger continues as a viable entity with more than sufficient assets to satisfy any award rendered by an arbitrator.

Likewise, the Fourth Circuit's decision in *Lever Brothers Co. v. International Chemical Workers Union, Local 217*, 554 F.2d 115 (4th Cir. 1976), does not conflict with the ruling below. While the appellate court upheld an

injunction preserving the status quo pending arbitration, the court had no occasion to examine the district court's resolution of the "balance of hardships" prerequisite to injunctive relief because it was not challenged on appeal. 554 F.2d at 119, n.6. In contrast, the district court's careful resolution of the balance of hardships under the circumstances of the present case has been reviewed by the Sixth Circuit and found to be correct.

Finally, the Eighth Circuit's decision in *Smegal v. Gateway Foods,* 763 F.2d 354 (8th Cir. 1985), involved the issue of a union's arbitrary action in breach of its duty of fair representation in refusing to process the plaintiffs' grievances. This issue is far afield from the question before the court below.

In sum, the asserted decisional conflicts are nonexistent and thus this case is not worthy of review by this Court.

2. NO ISSUE OF FUNDAMENTAL AND RECURRING LEGAL IMPORTANCE IS PRESENTED BY THIS CASE

The Sixth Circuit's decision merely involves the application of the abuse of discretion standard to the district court's conclusions. Those conclusions, in turn, merely involve the application of traditional equitable principles to a particular set of circumstances. Review of such determinations by this Court would not serve a useful purpose.

Contrary to the Union's contentions, the courts below did not misapply the traditional standards for injunctive relief.

First, the district court's finding that the Union failed to establish irreparable harm is consistent with the de-

cisions of this Court and numerous other courts. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Auto Workers v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983); *Aluminum Workers International Union v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982). Unlike other cases finding irreparable harm, there is no evidence in the record of this case to suggest that Kroger is unable to satisfy an arbitrator's award if the company is found to have violated the collective bargaining agreement.

Second, the court's findings that Kroger "will suffer substantial economic harm" if an injunction is issued (A23) and that the balance of hardships tips in Kroger's favor (A24) is fully consistent with the record evidence[4] and applicable case law. *Auto Workers v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983); *Aluminum Workers International Union v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982).

Third, the courts below applied the correct standard in assessing the "likelihood of success" prerequisite to injunctive relief. Contrary to the Union's assertions, there is, in fact, no difference between the Second Circuit's test, as enunciated in *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974), and the Sixth Circuit's test for determining whether the Union's position in arbitration is sufficiently sound to permit a status quo injunction. The Second Circuit's formulation—a grievance that is "plainly without merit" does not justify injunctive relief—is simply another way of stating the Sixth Circuit's rule that an injunction will only issue when the Union's position is

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4. The undisputed evidence showed that the wage rates established by the existing collective bargaining agreement rendered the stores unsaleable if the purchaser was required to abide by the agreement.

"sufficiently sound to prevent the arbitration from being a futile endeavor." *Auto Workers v. Lester Engineering Co.*, 718 F.2d 818, 824 (6th Cir. 1983). In view of substantial contrary arbitral precedent on the limited meaning of the boilerplate "successors and assigns" clause, it was clear to the district court that, without forceful bargaining history evidence,[5] the Union has no viable chance to prevail in the grievance arbitration.

Any one of the district court's conclusions is sufficient to justify its denial of injunctive relief. The Sixth Circuit's approval of the district court's conclusions as proper exercises of discretion renders any decision by this Court unnecessary.

3. THE ISSUE PRESENTED IS MOOT

Kroger long ago disposed of the assets of the three Lima stores. Thus, the action the Union sought to enjoin has already occurred and can no longer be prevented. Accordingly, there is no "case or controversy" within the meaning of U. S. Constitution, Art. III. *Honig v. Students of Calif. School for the Blind,* 105 S. Ct. 1820 (1985); *University of Texas v. Camenisch,* 451 U.S. 390 (1981).

Although the Sixth Circuit determined that the Union's request for an injunction pending arbitration presents a justiciable controversy, the matter is sufficiently in doubt to render this case unsuitable as a vehicle for review.

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5. In its petition to this Court, p. 20, the Union disingenuously accuses the district court of preventing it from presenting bargaining history evidence. As a matter of fact, it was Kroger that attempted to introduce such evidence but was prevented from doing so by an objection interposed by the Union.

CONCLUSION

The decisional conflicts posited by the Union are non-existent. The decision below is in the mainstream of the law and is not suitable for this Court's review. Accordingly, there is no basis for granting the Union's petition.

Respectfully submitted,

ROLF H. SCHEIDEL, *Counsel of Record*
TIMOTHY C. MCCARTHY
SHUMAKER, LOOP & KENDRICK
North Courthouse Square
1000 Jackson
Toledo, Ohio 43624-1573
(419) 241-9000
Counsel for Respondent,
The Kroger Company

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